APPENDIX

IN THE UNTED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-30817
Summary Calendar

JANET PIPPINS;

Plaintiff-Appellant,

Versus

TANGIPAHOA PARISH COUNCIL; GORDON BURGESS,
Individually and in His Official Capacity as Duly Elected Tangipahoa Parish President,

Defendants-Appellees.

Appeal from the United States District Court for
The Eastern District of Louisiana
(USDC No. 2:03-CV-1334)

Before REAVLEY, JOLLY and HIGGINBOTHAM, Circuit Judges.

PER CURIAM[1]

The judgment is affirmed for the following reasons:

1. We essentially agree with the analysis of the district court as set forth in the magistrate judge's Order and Reasons.

2. For the Louisiana whistleblower statute, La. Rev. Stat. Ann. §23:967 (West 1998), to apply, the employer must have committed a violation of state law. Puig v. Greater New Orleans Express Comm'n, 722 So.2d 842, 845 (La. Ct. App. 2000). The policy decision of the parish to limit animal cruelty investigations by the animal control department to pets, and to leave livestock cruelty investigations to other law enforcement officials with concurrent jurisdiction over such investigations, was not illegal or a violation of state law.

3. Summary Judgment was also warranted on the Title VII sex discrimination claim. Assuming that appellant Pippins established a *prima facie* case, the defendants offered legitimate nondiscriminatory reasons for her termination. Summary judgment was therefore appropriate if the plaintiff failed to present sufficient evidence of pretext under the summary judgment standard. See Price v. Federal Express Corp., 283 F.3d 715, 720 (5th Cir. 2002). Furthermore, a showing that the defendant's proffered justifications for the employment decision were rejected in part does not necessarily preclude summary judgment. Id. "Once a Title VII claim reaches the pretext stage, the only question on summary judgment is whether there is a conflict in substantial evidence to create a jury question regarding discrimination." Haynes v. Pennzoil Co., 207 F.3d 296, 300

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[1] Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

(5th Cir. 2000). We agree with the district court that Pippins did not present sufficient evidence of pretext for a rational jury to decide this case in her favor by finding that her termination was due to her gender. The evidence of sexual discriminations was limited to the *prima facie* proof that a man replaced her, while the evidence that she was fired for other reasons, including her failure to keep the department within its budget and the failure to follow the parish policy regarding livestock, was relatively so substantial that a rational jury could not find on this record that Pippins was terminated for discriminatory reasons.

AFFIRMED

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF LOUISIANA

JANET PIPPINS	**CIVIL ACTION**
VERSUS	**NO: 03-1334**
TANGIPAHOA PARISH COUNCIL AND GORDON BUGESS	**SECTION "N" (3)**

ORDER AND REASONS

Before the Court is a Motion for Summary Judgment filed on behalf of the defendants, Tangipahoa Parish Council and Gordon Burgess. Plaintiff, Janet Pippins ("Pippins"), filed a formal opposition memorandum and thereafter the matter was deemed submitted for determination. This matter is before the Court pursuant to the Court pursuant to the parties' consent to proceed pursuant to 28 U.S.C. 636(c). Having considered the record and the written submissions of the parties specifically addressing the defendant's Motion for Summary Judgment, the defendants' motion for summary judgment is GRANTED for the reasons set forth below.

I. CONTENTIONS OF THE PARTIES

The defendants note the plaintiff's complaint alleges three separate claims, to wit: (1) that she was fired in violation of Louisiana's "Whistleblower" statute, La. R.S. 23:967; (2) that the defendants discriminated against her on the basis of her sex in violation of state and federal law; and (3) retaliation based upon the plaintiff's alleged

confrontation was a white male subordinate regarding his inappropriate interaction with a black female employee.

First addressing the plaintiff's claim pursuant to Louisiana's Whistleblower Statute, defendants highlight that the plaintiff bears the burden of proving that reprisal against an employee, who discloses or threatens to disclose a work place act or practice, *constitutes a violation of state law*. The Parish contends that there is nothing "illegal" about its policy decision to focus the efforts of its Animal Control Department on the Parish's stray cat and dog problems and to leave the investigation of the intervention into livestock cruelty cases to the Sheriff's Department and the State's Livestock Brand Commission, which has personnel throughout the state of Louisiana and, together with the Parish Sheriff, are empowered and certified to perform the investigation of all crimes related to livestock, including animal health issues and cruelty. Inasmuch as there is no requirement that Parish governments have an Animal Control Department, defendants contend that it cannot be seriously questioned that the Parish may lawfully limit department duties to running the "dog pound," leaving the investigation of equine cruelty/mistreatment cases to specialists employed and trained by the State Department of Agriculture to handle all matters concerning livestock. Essentially, defendants submit that the plaintiff cannot prove that official policies regarding the coordination of two such agencies with overlapping jurisdiction for purposes of administrative efficiency and cost control is "illegal" within the meaning of Louisiana law or any other statute or regulation.

Plaintiff counters that the illegal action in this matter was the order restricting animal control officers sworn to uphold the laws of the State of Louisiana from doing so. Plaintiff contends that the Parish's administrative decisions predicated on budgetary concerns are of no moment. The thrust of Pippins argument is that (1) as a commissioned

animal control officer she was sworn to uphold the law; (2) Tangipahoa Parish Animal Control was equipped to handle livestock issues; and (3) she and her staff were ordered to neglect their duties with respect to livestock issues by Gordon Burgess.

Turning to the plaintiff's gender discrimination claim, the defendant contends that, applying the burden shifting framework established by *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), plaintiff's sex discrimination claim is similarly without merit. Defendants argue that the entirety of the aforesaid claim is premised on the single fact that she was replaced by a male and that, beyond pleading a *prime facie* case, there is a complete failure of proof. More particularly, the defendants note that they have amply demonstrated one or more legitimate, non-discriminatory reasons for the plaintiff's termination, to wit: (1) the plaintiff's admitted perennial failure to maintain department spending within budget; (2) admitted poor public relations with the press; (3) admitted failure to abide by Parish policy to focus the effects of Animal Control Department on stray cats and dogs, leaving intervention into livestock cases to the Parish Sheriff and the State's Livestock Brand Commission, which Commission is charged investigating such cases by Louisiana's Department of Agriculture; and (4) poor morale within Animal Control Department during the plaintiff's tenure.

Defendants point to the failure on the part of Ms. Pippins to identify any evidence of "pretext," an essential element of the plaintiff's claim upon which she bears the burden of proof. The thrust of the defendants' motion is that it is undisputed that the defendants have articulated one or more legitimate, non-discriminatory reasons for the employment decision to terminate the plaintiff and no reasonable fact finder could hold that gender discrimination motivated the defendant's decision to fire the plaintiff. Because evidence of discriminatory motive is absent, an

essential element of the plaintiff's gender discrimination claim, defendants contend that summary judgment is warranted dismissing plaintiff's gender discrimination claim with prejudice.

For her part, plaintiff maintains that she has established a *prima facie* case of gender discrimination and that summary judgment is appropriate because she has proffered substantial evidence indicating that her employer's motives are false. Essentially, it is the plaintiff's position that a jury should be allowed to make the reasonable inference that sex was a determinative reason for the decision to terminate her employment. As to her control over the budget, Pippins notes that it is undisputed that she exercised no control over the acceptance or denial of purchase orders submitted by her agency and that the assignment of the blame for her department exceeding its budget is untenable, because she had absolutely no control over approval of expenditures. As to poor public relations, Pippins argues that, despite the alleged severity of the problem, there is no reference to this shortcoming in her personal file. Plaintiff submits that Tangipahoa Parrish Council Policy requires that disciplinary actions be placed in an employee's personal file. Pippins contends that, because there is no mention of the issue in her personal file, there is no evidence regarding her poor performance in this regard. Plaintiff highlights Burgess's October 17, 2001 correspondence indicating that Pippins should be proud of her work. As to her alleged problem adhering to the Parish's directives concerning livestock issues, Plaintiff contends that Burgess was unable to cite one incident in which she violated the directive. Pippins further contends that there is absolutely no evidence of a morale problem in the Animal Control Department stemming from anything other than the fact that her department was overworked and understaffed. Plaintiff's position is that the proffered reasons have no legitimacy whatsoever and, from that alone, a reasonable

trier of fact could divine that the real motive for her termination was unlawful gender discrimination.

As to the retaliation claim, defendants argue that it falls short due to both the absence of proof a "protected activity" and a complete failure of proof of "causation." Defendants contend that it is undisputed that Burgess, who alone made the decision to terminate the plaintiff, was never made aware of the incidents upon which the plaintiff predicates her retaliation claim. Defendants highlight that, even the plaintiff, who was the supervisor in charge of the Animal Control Department and the employees in question, did not consider the "horseplay" between employees of her department either serious enough to thoroughly investigated it or to report it to her supervisor. Plaintiff does not counter the defendants' argument that they are entitled to summary judgment on her retaliation claim.

II. BACKGROUND

Plaintiff, Janet Pippins, negotiated and was given three-year contract of employment as Director of Tangipahoa Parish's Animal Control Department, commencing in February, 1997. Plaintiff was qualified for the position, holding two masters degrees, and having had twenty years experience with animals, as well as membership in local and state associations dealing with the treatment and care of animals. Her contract with the Parish was structured such that in February, 2000, *i.e.*, the end of the three-year term, the contract would automatically renew for an additional one-year unless notice was given by either party 90 days before each one-year renewal date. Ms. Pippins served her initial three-year term and it was automatically renewed for a fourth year. Prior to the end of the fourth year, the Parish timely notified her that the employment agreement would not be renewed for the following year. Instead, Pippins was notified that she would be permitted to continue in her

position as Director, but as an "at-will" employee. After a month as an "at-will" employee, Tangipahoa Parish President, Gordon Burgess, terminated Pippins for the following reasons, to wit: (1) the failure to keep department spending within the planned budget; (2) poor public relations; (3) her resistance to the policy decision to allow livestock cases to be handled by other agencies; and (4) poor work supervision and employee morale.

As to the first, plaintiff admitted that every year that she served as Director of Animal Control, her department exceeded the planned budget. *See* Pippins Deposition at p. 103. Pippins further conceded that she had poor public relations with the *Daily Star*, was "fried by the press" and refused to speak with Star reporter Ms. Schon for a period of time until relations with the press improved. *See* Pippins Deposition at pp. 182-183, 185. There was no notation of the unfavorable publicity in the plaintiff's personal file.

It is undisputed that the State Livestock Brand Commission operates in Tangipahoa Parish and has jurisdiction over health issues and infractions involving cruelty to livestock. The Commission has personnel throughout of the State of Louisiana, all of whom are P.O.S.T certified, commissioned by the State Police and empowered to investigate all crimes related to livestock, including animal cruelty claims. *See* Averitte Deposition at pp. 7-9. All complaints involving livestock, including horses, should be handled by first reporting same to the Sheriff's Office, which can, in turn, notify the Livestock Brand Commission and request assistance. *Id* at p. 10. It is further undisputed that Avertitte, an Enforcement Manger with the State's Livestock Brand Commission met with Parish President Burgess regarding coordination of their efforts. The upshot of this meeting was the understanding that the State Brand Commission would remain responsible for the investigation of livestock, insofar as health conditions and cruelty cases involving livestock, with the Parish Sheriff

being notified first. Commission Enforcement Manager Robbie Diane Averitte testified that, while she had worked together with the Tangipahoa Parish Animal Control Department in the past in some equine cruelty cases, the State Commission can handle all such matters regarding livestock on its own. *Id* at pp. 7, 14. It is further undisputed that Gordon Burgess refused to allow the Animal Control Department to intervene in cases involving equine cruelty, leaving cases involving livestock to the State and the Parish Sheriff and that this is the sole basis of the plaintiff's claim under Louisiana's "Whistleblower" Statute. *See* Pippins Deposition at p. 176. In accordance with the wishes of the Parish Council and particularly in light of the limited resources of the Animal Control Department, Burgess adopted the policy of focusing the efforts of the Parish's Animal Control Department on domestic pets (such as cats and dogs), leaving cases involving the investigation of livestock to the State Department of Agriculture's Livestock Brand Commission and the Sheriff of Tangipahoa Parish. *See* Burgess Affidavit at ¶5. It is uncontroverted that there is no requirement that any parish institute and operate an agency with the particularized purpose of animal control or law requiring any parish to employ animal control officers.

On January 29, 2002, Tangipahoa Animal Control responded to a request from the Sheriff's Department to handle a complaint on Galafora Road involving starved horses. Prior to responding, plaintiff requested permission from Buddy Weir, Parish Finance Administrator, and was instructed not to intervene. The public outcry was intense and, thereafter Burgess stipulated to the procedure of a drive-by assessment to investigate a complaint about livestock. However, if there appeared to be an infraction, Animal Control Officers were instructed to contract the Parish Sheriff to provide the necessary intervention.

On March 12, 2002, Pippins accomplished Animal Control Officer Millard E. "Billy" Gottschalck to follow-up

on a complaint of mistreated horses at a location west of Amite, Louisiana. Upon arrival, they observed several of the horses in poor condition. Pippins then notified the Sheriff's Department and requested an escort to accompany her onto the premises so that she could further investigate the owner and the livestock. During the course of this second intervention involving equine mistreatment, Pippins was contacted by Donna Domiano, Burgess's secretary, and instructed to contact him immediately. Burgess and Pippins disagreed as to the procedures applicable to the livestock issues; Pippins felt that she was in compliance and Burgess was not persuaded. Burgess ordered her to return to the Shelter and Pippins returned and contacted Robbie Averitte of the Livestock Brand Commission to report the incident. Averitte did request Pippins' assistance in sheltering the animals and Pippins refused in light of Burgess's order. The Brand Commission handled the incident in its entirety.

On March 19, 2002, on the heels of this last incident Pippins' intervention into an equine mistreatment case, Burgess fired Pippins noting that there were "a lot of complaints" and "budgetary restrictions." At the time Pippins was terminated, Burgess was not aware that Mike Harris had engaged in any inappropriate behavior (*i.e.*, "horseplay") in the workplace or that he had been corrected and counseled by his supervisor, the plaintiff. Burgess's first notice of the incidents which form the basis of the plaintiff's retaliation claim was long after Pippins filed the captioned matter, when defense counsel informed him of the basis of the plaintiff's retaliation claim. *See* Burgess Affidavit at ¶13. Pippins did not report the incident to Burgess, who alone made the decision to fire her.

III. SUMMARY JUDGMENT STANDARD

The principle purpose of Fed. R. Civ. P. 56 is to "isolate and dispose" of factually unsupported claims.[1] Summary judgment is proper where "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact . . ."[2] There is no "genuine issue" when the record taken as a whole could not lead a rational trier of fact to find for the nonmovant.[3]

Summary Judgment will be granted against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."[4] A complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.[5] "In such a situation, there can be 'no genuine issue of material fact' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."[6] The Court has no duty to search the record for triable issues.[7] Mere assertions of a factual dispute unsupported by probative evidence will not prevent summary judgment.[8]

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[1] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).
[2] Fed. R. Civ. P. 56(c)
[3] *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).
[4] *Celotex*, 477 U.S. at 323.
[5] *Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993); *Celotex*, 477 U.S. at 323; *Wenner v. Texas Lottery Commission*, 123 F.3d 321, 324 (5th Cir.), *cert. denied*, 523 U.S. 1073 (1998).
[6] *Celotex*, 477 U.S. at 322-23.
[7] *Ragas v. Tennessee Gas Pipeline Co.*, 136 F. 3d 455, 458 (5th Cir. 1998).
[8] *Celotex*, 477 U.S. at 248-50; Abbot v. Equity Group, Inc., 2 F.3d 613, 619 (5th Cir. 1993).

"The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which the evidence supports his and her claim."[9] Conclusory statements, speculation and unsubstantiated assertions are not competent summary judgment evidence and will not suffice to defeat a properly supported motion for summary judgment.[10] "Summary judgment is appropriate in any case 'where critical evidence is so weak or tenuous on an essential act that it could not support a judgment in favor of the nonmovant.'"[11]

IV. ANALYSIS

A. Louisiana's Whistleblower Protection Act

Louisiana's Whistleblower Protection Act, La. R.S. 23:967, provides, in pertinent part:

> A. An employer shall not take reprisal against an employee who in good faith, and after advising the employer of the violation of law:
>
> (1) Discloses or threatens to disclose a workplace act or practice that is in violation of state law.
>
> (2) Provides information or testifies before any public body conducting an investigation, hearing or inquiry into any violation of law.

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[9] *Ragas*, 136 F.3d at 458 (emphasis added).

[10] *Id.*; *Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996).

[11] *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075-76 (5th Cir. 1994) (*citing Armstrong v. City of Dallas*, 997 F.2d 62 (5th Cir. 1993)); *see also Read v. BT Alex Brown*, 2003 WL 21754966*2(5th Cir.), *cert. denied*, 2004 WL 323271 (U.S. February 23, 2004).

> (3) Objects or refuses to participate in an employment act or practice that is in violation of the law.

La. R.S. 23:967. It is clear from Pippins' deposition testimony that the sole basis of "whistleblower" liability is the policy decision by the Parish President and directive that she focus her department's efforts on stray cats and dogs and leave the investigation into livestock infractions to Louisiana's Livestock Brand Commission and the Sheriff of Tangipahoa Parish.

Pippins has identified no employment act or practice which constitutes a "violation of law," whether state or federal, and thus her claim pursuant to La. R.S. 23:967 must fail as a matter of law. It is not disputed that the Parish Government is not even required to operate an Animal Control Department and any Parish policy that would defer intervention/enforcement of laws with respect to livestock issues to the Parish Sheriff and the State's Livestock Brand Commission is simply not a violation of any law identified by Pippins.

In *Puig v. Greater New Orleans Expressway Commission*, 772 So.2d 842, 845 (La. App. 5th Cir. 2000), the court held that Louisiana's whistleblower statute does require an actual violation of law. *See also Ware v. Cleco Power LLC*, 2004 WL 1333869 (5th Cir., January 21, 2004); *Wells v. Alexandria*, 2004 WL 909735 (5th Cir., April 29, 2004).

B. Gender Discrimination under Title VII and Louisiana

Title VII makes it unlawful for an employer to discharge or otherwise discriminate against an individual with respect to that person's compensation, terms, conditions, or privileges of employment, or to otherwise adversely affect the person's status as an employee, because

of that person's sex.[12] The summary judgment test for discrimination claims under § 1983 is the same as the test for discrimination under Title VII.[13] Here, there is no evidence[14] that the defendants discriminated against plaintiff because of her sex; therefore, the familiar McDonnell Douglas burden-shifting framework applies.[15]

"Under the McDonnell Douglas framework, the parties dance an adversarial three-step, in which: (1) plaintiff proves her *prima facie* case by a preponderance of the evidence; (2) the defendant rebuts the presumption of intentional discrimination ... by articulating legitimate, non-discriminatory reasons for the challenged action; and (3) the plaintiff counters by offering evidence that the legitimate, non-discriminatory reasons are really a pretext for discrimination."[16] In a case involving direct evidence of discrimination, the aforesaid framework does not apply; rather, the burden shifts directly to the defendant to show that the same action would have been taken regardless of the impermissible criterion.[17]

To establish a *prima facie* case of unlawful termination on account of gender, the plaintiff must prove that: (1) she was qualified for the position at issue; (2) she was within a protected class; (3) she was fired; and (4) her

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[12] *See* 42 U.S.C. § 2000e-2(a).

[13] *See Patel v. Midland Memorial Hospital and Medical Center*, 298 F.3d 333, 342 (5th Cir. 2002), *cert denied*, 537 U.S. 1108 (2003); *Pratt v. City of Huston*, 247 F.3d 601, 605 n.1 (5th Cir. 2001).

[14] In the Title Vii context, direct evidence of discrimination is evidence that proves that the defendant acted with discriminatory intent without the need for inference or presumption, including any statement or document which shows on its face that an impermissible criterion served as a basis for the adverse employment action. *See Fabela v. Socorro Indep. School Dist.*, 329 F.3d 409, 415 (5th Cir. 2003).

[15] *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 222 (5th Cir. 2000).

[16] *Rutherford v. Harris County Texas*, 197 F.3d 173, 180 (5th Cir. 1999)(*quoting Casarez v. Burlington Northern/Santa Fe*, 193 F.3d 334, 337 (5th Cir. 1999)).

[17] *See Fierros v. Tex. Dept. of Health*, 274 F.3d 187, 192 (5th Cir. 2001).

position was filed by someone outside of the protected class.[18]

If the plaintiff establishes a *prima facie* case, an inference of discrimination arises and the defendant must articulate some legitimate, non-discriminatory reason that, if believed, would support a finding that the employment decision was legitimate and non-discriminatory.[19] Defendant need not persuade the court that it was actually motivated by this reason.[20] The aforesaid burden on the employer is one of production only, not persuasion, involving no credibility assessments.[21] In *Sandstad v. CB Richards Ellis, Inc.* 309 F.3d 893 (5th Cir. 2002), the Firth Circuit disagreed with the plaintiff's argument that *Reeves* required the court to disregard the testimony of managers participating in the employment decision, "which would in effect eliminate his burden to show that the [defendant's] explanation is pretextual."[22]

If the employer carries its burden of production, the mandatory inference of discrimination established by the *prima facie* case fades from the picture[23] and the plaintiff must come forward with evidence to show that the defendant's proffered reasons are false and that unlawful discrimination was a determinative factor.[24] The burden of

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[18] *Rutherford v. Harris County, Texas*, 197 F.3d 173, 179 (5th Cir. 1999).
[19] *See Sandstad v. CB Richards Ellis, Inc.*, 309 F. 3d 893, 898 (5th Cir.), *cert. denied*, 123 S. Ct. 2572 (2003), *reh'g denied*, 124 S. Ct. 36 (2003).
[20] *Williams v. Time Warner Operation, Inc.*, 98 F.3d 179 (5th Cir. 1996).
[21] *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000) (*citing St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509 (1993)); *see also Sandstad*, 309 F.3d at 898.
[22] *Id.* at 898.
[23] *Reeves*, 530 U.S. at 142-43.
[24] *See Read v. BT Alex Brown, Inc.*, 2003 WL 21754966* 2 (5th Cir.), *cert. denied*, 2004 WL 323271 (U.S. February 23, 2004); *Wallace v. Methodist Hospital System*, 271 F.3d 212, 224 (5th Cir. 2001) (rejecting the plaintiff's argument that her *prima facie* case considered in tandem with the *allegedly* substantial evidence of pretext rendered the district

persuasion that the defendants intentionally discriminated remains at all times with the plaintiff.[25] Ultimately, "liability depends on whether the protected trait actually motivated the employer's decision."[26] Specifically, the plaintiff must demonstrate that her gender actually played a role in the employer's decision-making process and had a determinative influence on the outcome.[27]

The Supreme Court in *Reeves* neatly summarized what the plaintiff's evidence must show to avoid summary judgment as a matter of law, to wit: (1) that the stated reasons were not the real reason for the adverse employment decision; and (2) that prohibited discrimination was the real reason for the adverse employment decision.[28] The Supreme Court clarified that, to meet this burden, "a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's justification is false, *may* permit the trier of fact to conclude that the employer unlawfully discriminated."[29] Factors relevant to aforesaid inquiry include "the strength of the plaintiff's *prima facie* case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered."[30] The *Reeves* Court observed: "Certainly there will be instances where, although the plaintiff has established a *prima facie* case and set forth

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court's grant of JMOL inappropriate under *Reeves*), *cert. denied*, 535 U.S. 1078 (2002).

[25] *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993); *Meinecke v. H & R Block of Houston*, 66 F.3d 77, 83 (5th Cir. 1995).

[26] *Reeves*, 530 U.S. at 141 (*citing Hazon Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)).

[27] *See Travis v. Board of Regents of Univ. of Texas System*, 122 F.3d 259, 263 (5th Cir. 1997) ("A Title VII plaintiff bears the burden of proving not only that the employer's purported reasons for taking adverse employment action are pretextual, but also that the employer engaged in illegal discrimination.")

[28] *See Reves*, 530 U.S. at 153.

[29] *Id.* at 148 (emphasis added).

[30] *Price v. Fed. Express Corp.*, 283 F.3d 715, 720 (5th Cir. 2002).

sufficient evidence to reject a defendant's explanation, no rational factfinder could conclude that the action was discriminatory."[31]

Because the plaintiff bears the ultimate burden of proving that intentional discrimination was a motivating factor by a preponderance of the evidence, she "must produce substantial *evidence* that the defendant's nondiscriminatory reason is merely a pretext for impermissible discrimination."[32] "Where the plaintiff fails to produce substantial evidence of pretext, or produces evidence permitting only an indisputably tenuous inference of pretext, summary judgment in favor of the defendant is appropriate."[33] "Nothing in Reeves ... abrogates Bauer's requirement of substantial evidence to support a claim of pretext."[34]

The Court need not decide whether Pippins has established a *prima facie* case, since for the purposes of the instant motion for summary judgment, the defendant concedes that the plaintiff has in fact done so. Turning to the issue of whether the defendant has proffered a legitimate non-discriminatory reason for the employment decision at issue, clearly it has proffered at least one or more legitimate non-discriminatory reasons. As discussed above, the defendant Burgess has submitted an affidavit, replete with specific details, regarding the creation of the Animal Control Department and the Director's position, as well as Pippins contract, which was automatically renewed for a term of one year in accordance with its terms. Thereafter, plaintiff was

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[31] *Reeves*, 530 U.S. at 148.

[32] *Read v. BT Alex Brown, Inc.* 2003 WL 21754966* 2 (5th Cir. 2003) (italicized emphasis added); *Auguster v. Vermilion Parish School Board*, 249 F. 3d 400, 403 n. 3 (5th Cir. 2001); *Bauer v. Albermarle Corp.*, 169 F.3d 962, 967 (5th Cir. 1999).

[33] *Read, supra (citing Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 897 (5th Cir. 2002) and *Brown v. CSC Logic, Inc.*, 82 F.3d 651 (5th Cir. 2002)).

[34] *Auguster*, 249 F.3d at 403 n. 3.

timely notified that the contract would not be renewed after the fourth year. After one month as an "at-will" employee, plaintiff was notified that she was terminated for reasons previously enumerated above. Thus, in order to survive summary judgment, Pippins must offer sufficient competent summary judgment evidence of pretext to create a question of fact for the jury that gender was the real reason the Burgess "fired" her.

Other than this solo instance, there is no evidence that Burgess ever discriminated against her or any other employee on the basis of her sex. Plaintiff does not allege a pattern of discrimination against her by the Parish. Plaintiff's evidence falls far short of the mark required to prove intentional discrimination on account of her sex. Burgess alone made the decision to fire the plaintiff on the heels of two incidents involving her active intervention into livestock cases. The evidence admits only that Burgess and Pippins had a major disagreement regarding who would intervene in matters involving livestock and that, in this regard, the working relationship was frayed. The second incident, on March 2, 2002 in which Pippins intervened in a livestock/equine mistreatment incident, occurred only after Burgess stated that Parish policy was to leave the intervention into such cases to the Parish Sheriff and Brand Commission. There is simply no evidence from which a rational factfinder could divine intentional discrimination on the basis of *sex*.

Pippins must establish some nexus between that adverse employment action and the plaintiff's gender. A bald assertion that one exists simply will not suffice.[35] Merely disputing an employer's assertion of an employee's work performance will not necessarily support an inference of pretext. Burgess has articulated at least one legitimate and nondiscriminatory reason for his actions. Therefore, "the

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[35] *See id.*

question is not whether an employer made an erroneous decision; it is whether the decision was made with discriminatory motive."[36] For a factfinder to infer pretext, the plaintiff must show that she was "clearly better qualified," as opposed to merely better qualified than her successor.[37] In order to defeat summary judgment, the difference in qualifications must be "so apparent as virtually to jump off the page and slap us in the face."[38] Moreover, evidence of superior qualifications must be more than merely subjective and speculative;[39] evidence of comparative work performance is needed.[40]

Plaintiff's opinion of herself and her work experience or classification of herself as better qualified than the person who succeeded her as the Director are insufficient to provide an inference of discriminatory intent by the defendant.[41] "As the Fifth Circuit has noted, the issue at stake in an employment discrimination case is not whether the employer's decision was the correct decision or a fair decision or the best decision; rather, the issue is whether the employer had a discriminatory motive."[42] The summary judgment record is bereft of any proof that the illegitimate criterion (sex) actually motivated Burgess' decision to fire her.

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[36] *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1091 (5th Cir. 1995).

[37] *See Price v. Federal Express Corp.*, 283 F.3d 715, 723 (5th Cir. 2002); *EEOC v. La Office of Community Services*, 47 F.3d 1438, 1444 (5th Cir. 1995); *Nichols v. Loral Vought Systems Corp.*, 81 F.3d 38, 41 (5th Cir. 1996).

[38] *Louisiana Office of Community Services*, 47 F.3d 1445.

[39] *See Nichols*, 81 F.3d at 41.

[40] *See id.*

[41] *See Lawrence v. University of Texas Medical Branch at Galveston*, 163 F.3d 309, 312-13 (5th Cir. 1999).

[42] *Weathersby v. Saks*, 1999 WL 148441 *2 (E.D. La.) (McNamara, J.) (citing *Deines v. Tex. Dept. of Protection and Regulatory Services*, 164 F.3d 279, 282-82 (5th Cir. 1999).

Moreover, it defies logic that Burgess and/or the Parish of Tangipahoa, which initially negotiated a three-year contract with the plaintiff (a female) for the position of Director of the Animal Control Department and allowed the plaintiff's contract to be automatically extended for one year, would later intentionally discriminate against her *on the basis of sex*. In the case of discriminatory firing, where the individual plaintiff's hiring and firing supervisor are one and the same, the Fifth Circuit has held that such a situation gives rise to an inference of non-discrimination. The *Brown* court explained that it is unlikely that a decision maker "would hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job."[43]

In the final analysis, Pippin's subjective perception of discriminatory motive is all that remains. It has long been the law of the Fifth Circuit that an employee's own subjective belief of discrimination, no matter how genuine, cannot serve as the basis for judicial relief.[44] Moreover, the subjective belief of a fellow employee, whether coworker or supervisor, suffers from the same defects as the plaintiff's subjective belief.[45] Where, as here, the employee fails to adduce evidence refuting a rational, non-discriminatory reason articulated by the employer, pretext cannot be established by the subjective belief that the illegitimate criterion gender motivated the employer's decision.[46] The summary judgment record reveals some inconstancies in Burgess' explanation regarding the complaint regarding the budgetary constraints and the plaintiff's failure to reign in

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[43] *See Neito v. L & H Packing Co.*, 108 F.3d 621, 624 (5th Cir. 1997) (*citing Brown v. CSC Logic*, 82 F.3d at 658) (internal quotation marks omitted).

[44] *See, e.g., Price v. Marathon Cheese Corp.*, 119 F. 3d 330, 337 (5th Cir. 1997); *Armendariz v. Pickerton Tobacco Co.*, 58 F.3d 144, 153 (5th Cir. 1995), *cert. denied*, 516 U.S. 1047 (1996).

[45] *See Little v. Republic Refining Co.*, 924 F.2d at 93, 96 (5th Cir. 1991).

[46] *See Armendariz*, 58 F.3d at 153.

spending; however, other considerations including her failure to abide by his directives were most apparently the driving force behind the decision to fire her. The record evidence does not admit a finding of either falsity of the explanation given for the plaintiff's termination or pretext.[47] Burgess' affidavit detailing the specifics leading up to his decision to fire Pippins suffers from no lack of detail and is corroborated in pertinent part by the plaintiff's own deposition testimony.

Suffice it to say, "discrimination suits still require evidence of discrimination."[48] Looking at the summary judgment record as a whole, the Court concludes that the plaintiff has failed to advance *substantial* evidence to support an inference of intentional *gender* discrimination.

C. Retaliation

In order to establish a *prima facie* case of retaliation under either Louisiana law or Title VII, the plaintiff must show that: (1) she engaged in activity protected by Title VII; (2) there was an adverse employment action; and (3) a causal nexus between the protected activity and the adverse employment action.[49] Louisiana courts look to Title VII standards to apply La. Rev. Stat. 51:2256 and thus the aforesaid standards are the only ones that need be examined.[50] To show a causal nexis, a plaintiff must show (1) a protected activity that (2) was among the factors motivating the adverse employment action.[51] Temporal proximity between the protected activity and the adverse

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[47] *See Read*, 2003 WL 21754966 ** 6-7 (5th Cir. 2003).

[48] *Rubinstein v. Administrators of Tulane Educational Fund*, 218 F. 3d 392, 400 (5th Cir. 2000).

[49] *See Casarez v. Burlington Northern/Santa Fe Co.*, 193 F.3d 334, 339 (5th Cir. 1999).

[50] *See Devillier v. Fidelity & Deposit Co. of Md.*, 709 So. 2d 277, 280 (La. App. 3rd Cir. 1998); *McMillan v. Corridan*, 1999 WL 729250, at *2 (E.D. La. Sept. 15, 1999).

[51] *See Long v. Eastfield College*, 88 F.3d 300, 305 n. 4 (5th Cir. 1996)).

employment action may be a significant factor in showing this causal nexus.[52]

The incidents allegedly giving rise to Pippins' retaliation claim involve her alleged confrontation with a subordinate white male, Michael Harris, regarding his alleged inappropriate behavior, i.e., "horseplay," with a black employee, Ms. Mobley. Details set forth by the plaintiff describing the incidents do not describe any type of "protected activity." *See* Pippins Deposition at pp. 162-163. Additionally, Pippins conceded that she did not bring the incident to the attention of Burgess and she could not remember whether it was reported to her superior, the finance director, Mr. Weir. *Id* at 163-164.

Under Title VII, an employee has engaged in protected activity if he or she has (1) "made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this subchapter."[53] Here, the participation clause is not implicated at all. More particularly, it is undisputed that, with respect to the incidents in question, there was no charge, investigation, proceeding or hearing instituted and Ms. Mobley never complained about "the horseplay" in question. To satisfy the "opposition clause," Pippins need not prove that the Parish's practices were actually unlawful; however, plaintiff must show that she had "a reasonable belief that the employer was engaged in unlawful employment practices."[54] Simply stated, a showing of a subjective good faith is insufficient.[55] Pippins engaged in no investigation of the incidents and does not even remember

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[52] *See Evans v. City of Huston*, 246 F. 3d 344, 356 (5th Cir. 2001); *Swanson v. Gen. Servs. Admin.*, 110 F.3d 1180, 1188 (5th Cir. 1997).

[53] 42 U.S.C. § 2000e-3(a)(emphasis added). *See also Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 427-428 (5th Cir. 2000).

[54] *Byers*, 209 F.3d at 428 (*citing Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. 1981).

[55] *Id.*

reporting that fact that she reprimanded Harris to her superiors. Under the circumstances, even a showing of subjective good faith belief regarding an unlawful employment practice cannot be made in this case. In summary, plaintiff cannot show protected activity at all, much less "protected activity" that was at least part of Burgess's motivation for firing her.

Accordingly,
IT IS ORDERED that the defendants' Motion for Summary Judgment is hereby GRANTED. New Orleans, Louisiana, this 12 day of July, 2004.

/s/
DANIEL E. KNOWLES, III
UNITED STATES MAGISTRATE JUDGE

STATUTE

Civil Rights Act of 1991 Sec. 107
Added into Civil Rights Act of 1964 Section 703(m)

Sec. 107 Clarifying Prohibition Against Impermissible Consideration of Race, Color, Religion, Sex, or National Origin in Employment Practices

(a) In General. – Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by sections 105 and 106) is further amended by adding at the end the following new subsection:

> (m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(b) Enforcement Provisions. – Section 706(g) of such Act (42 U.S.C. 2000e-5(g)) is amended –

> (1) by designing the first through third sentences as paragraph (1);
>
> (2) by designating the fourth sentence as paragraph (2)(A) and indenting accordingly; and
>
> (3) by adding at the end the following new subparagraph:
> (B) On a claim in which an individual proves a violation under section 703(m) and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court-

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m); and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).